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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 876

CARL EMIL LUDWIG KREPPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 62–86) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 11, 1946 (R. 87). The petition for a writ of certiorari was filed January 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was error for the trial court to grant the Government's pre-trial motion, which petitioner's counsel did not oppose, to eliminate certain words from each count of the indictment, where the elimination of the words, which were clearly surplusage, was not for the purpose of avoiding an adverse ruling on demurrer and did not, as petitioner contends, have the effect of depriving him of the opportunity to plead double jeopardy.

2. Whether an American citizen residing in enemy territory was an enemy within the meaning of Section 3 (c) of the Trading with the Enemy Act, making it unlawful to send any letter out of the United States intended for an enemy.

STATUTES INVOLVED

Sections 2, 3, and 16 of the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, 412, 425, provide in pertinent part:

> SEC. 2 [50 U. S. C. App. 2]. The word "enemy," as used herein, shall be deemed to mean, for the purposes of * * * this Act—
>
> (a) Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *.
>
> * * * * *
>
> (c) Such other individuals * * * as

may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident * * *, as the President * * * may, by proclamation, include within the term "enemy."

* * * * *

SEC. 3 [50 U. S. C. App. 3]. It shall be unlawful—

* * * * *

(c) For any person [with certain exceptions] to send, or take out of, or bring into * * * the United States, any letter or other writing * * *, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, * * * intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: *Provided, however,* That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President.

* * * * *

SEC. 16 [50 U. S. C. App. 16]. Whoever shall willfully violate any of the provisions of this Act * * * shall, upon convic-

> tion, be fined not more than $10,000, or * * * imprisoned for not more than ten years, or both; * * *.

Section 303 of the First War Powers Act of December 18, 1941, c. 593, Title III, 55 Stat. 840, 50 U. S. C. App., Supp. V, 618, provides in pertinent part:

> Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify * * *. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall, upon conviction, be fined not more than $10,000, or * * * imprisoned for not more than ten years, or both; * * *.

STATEMENT

Count 1 of a two-count indictment (R. 3–4), filed December 15, 1944 (see R. 1) in the District Court for the District of New Jersey, charged that petitioner, "on or about the 19th day of December, 1941," "did unlawfully send and transmit and at-

tempt to send and transmit out of the United States, and cause persons acting at his instigation and under his direction and control and on his behalf [and in furtherance of a joint or common scheme or enterprise][1] to send and transmit and attempt to send and transmit out of the United States, a communication which was intended for or to be delivered to enemies of the United States and allies of enemies of the United States in Germany and Spain," in violation of Section 3 (c) of the Trading with the Enemy Act (50 U. S. C. App. 3 (c)), *supra*, p. 3 (R. 3). Count 2 charged that

[1] The words set off by brackets appeared, unbracketed, in both counts of the indictment as originally filed (see R. 66, 67). On March 9, 1945 (see R. 2, 42), four days prior to trial (see R. 5), the United States Attorney, in the presence of petitioner and both his attorneys (R. 42), made a motion "to eliminate certain words in each of Counts 1 and 2 * * *, namely 'and in furtherance of a joint or common scheme or enterprise.'" Counsel for petitioner did not oppose, and the motion was granted. (R. 43.) The words in question were not physically stricken, but were bracketed in green pencil (see R. 79, 81). Subsequently, on March 14, 1945 (see R. 5), after the jury had been charged and immediately following their retirement to consider their verdict, the trial judge recalled them (R. 33) and instructed them as follows: "You will have with you, ladies and gentlemen of the jury, the indictment and inadvertently I omitted to call your attention to the fact that on a motion heretofore granted the following words were elided from both counts: 'in furtherance of a joint or common scheme or enterprise.' That has been marked on each one and that language will be excluded from the indictment. I think that covers it" (R. 34). The elimination of these words from the indictment is the subject of one of the contentions made in the petition for a writ of certiorari, hereafter discussed (*infra*, pp. 11–18).

petitioner, "on or about the 19th day of December, 1941," did willfully "use and attempt to use in a communication between the United States and Germany, being sent by the defendant and persons acting at his instigation and under his direction and control and on his behalf [and in furtherance of a joint or common scheme or enterprise],[2] a code and other devises for the purpose of concealing from censorship, under rules and regulations established by the President of the United States, the true and intended meaning" of such communication, in violation of Section 303 of the First War Powers Act (50 U. S. C. App., Supp. V, 618), *supra*, p. 4 (R. 4). On March 14, 1945, petitioner was found guilty on both counts after a jury trial and on March 23, 1945, he was sentenced to imprisonment for ten years on each count, the terms to run concurrently (see R. 2, 34). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of conviction was affirmed (R. 87).

The Government's evidence may be summarized as follows:

Mrs. Hilda Frey, the daughter-in-law of petitioner's wife, Mrs. Bertha Krepper (R. 7), testified that: Petitioner, whom she had known for twenty years, became the pastor of a church in Carteret, New Jersey, about four years prior to the trial (R. 6). Some time prior to 1941, peti-

[2] See footnote 1.

tioner and his wife, who was an American citizen, had gone to Germany, and Mrs. Krepper had thereafter returned to the United States (R. 11). In March 1941, Mrs. Krepper returned to Germany and, so far as the witness knew, was still living there, in Budelsdorf (R. 7, 11). On or about December 16, 1941, petitioner returned to the United States from Germany and immediately went to live with the Freys in their home in Clark Township, New Jersey (R. 6, 7). The witness had been accustomed to writing letters to Mrs. Krepper, addressing them directly to her in Budelsdorf, Rensburg, Germany. Shortly after petitioner's arrival,[3] she wrote another letter to Mrs. Krepper in petitioner's presence. Petitioner directed her to address it to his wife in care of "Reverend Kloess," Barcelona, Spain. (R. 8.) He told her

[3] On direct examination, Mrs. Frey stated that she thought this letter was written "about within the first week" following petitioner's arrival at her home, which was on or about December 16, 1941 (R. 7). On cross-examination, she stated that she wrote it on Friday, December 19, 1941; asked how she could recall the date so specifically, she said that she "looked it up on the calendar" when she "was being questioned about all these things"; she further explained that "some of Mr. Krepper's statements were read in court at his last trial and they have helped me to remember" the date (R. 12). On redirect examination, she stated that "one of the exhibits from the last trial, which was a letter from Germany referring to a specific date," and which had been shown to her, had helped to refresh her recollection as to the exact date (R. 14). The "last trial" referred to was, apparently, in connection with indictment No. 3000c, charging petitioner with conspiracy (see R. 2, 79, 80; see also *infra*, pp. 16–17).

to tell Mrs. Krepper in the letter that he had arrived safely in the United States and "to send greetings" to "Pastor Kaiser"[4] and other people whom she could not remember (R. 9). She followed his directions and mailed the letter (R. 9–10). She did not submit it to the President or to the Secretary of the Treasury, nor apply for any license permitting her to send it (R. 10).

Shirley Stephens, enforcement chief of the Treasury Department's Bureau of Customs, testified that he had personally issued all licenses that had been issued under Section 3 (c) of the Trading with the Enemy Act (*supra*, p. 3) since the outbreak of World War II, and that no license to send a letter to Germany had been issued either to petitioner or to Mrs. Frey (R. 15).

Marcel C. Phillips, a special agent of the Federal Bureau of Investigation, testified that he and other agents questioned petitioner on September 29, 1944, concerning his activities in Germany and the United States. Petitioner came voluntarily to their office and they disclosed their identity to

[4] On cross-examination, Mrs. Frey stated that she had no independent recollection of petitioner's having told her to send greetings in her letter to "Pastor Kaiser" (R. 14), explaining that "In one of his statements at Mr. Krepper's last trial [see footnote 3] he said that he told me to write a message to Pastor Kaiser, and whatever Mr. Krepper told me to write, I wrote" (R. 13). "Mr. Krepper said that he told me to write that message to Pastor Kaiser," she further explained, "and I know this about myself, that whatever he told me to write I would have written" (R. 14).

him. They advised him of his constitutional rights, and explained to him that he did not have to make any statements to them and that anything he said would be used against him. Subsequent interviews were held on October 2, 3, 5, 9, and 13. (R. 16.) In the course of these interviews, petitioner told the agents that at a meeting with one Walter Kappe in Berlin in September 1941, he and Kappe entered into an agreement whereby the name "Pastor Kaiser" would be mutually understood as a code designation referring to Kappe in all correspondence between petitioner and his wife; that the code was to apply to letters going "both ways, coming from his wife in Germany or to his wife in Germany"; that the reason for the use of the code was that Kappe did not want his name to appear in letters going out of Germany; and that "Pastor Kaiser" was selected as the "password" because "it would be natural to mention just from one minister to another." Following the Berlin meeting with Kappe, petitioner further stated to the agents, he "returned home" and apprised his wife of the code arrangement he had with Kappe, without, however, explaining "all the situation to her." (R. 17.) Petitioner further told the agents that he met another minister in Barcelona, Spain, a Reverend Ernest Kloess, who agreed to forward "on to his wife in Germany" all mail addressed to Mrs. Krepper, and to forward to petitioner, in care of

one Anthony Boresch in Rahway, New Jersey, all mail addressed to him (R. 17–18). Shortly after his arrival in the United States, petitioner stated, his daughter-in-law, Mrs. Frey, wrote a letter to Mrs. Krepper in care of Pastor Kloess in Barcelona, and he told her to "send greetings to his friends and to Pastor Kaiser" in the letter (R. 18); the letter in question was the first letter written by Mrs. Frey to Mrs. Krepper following petitioner's return to the United States (R. 20). With the consent of counsel for petitioner, the following excerpt from a written statement by petitioner, dated October 13, 1944, was read into the record (R. 21):

> The only suggestion I recall making to Mrs. Frey in connection with these letters were made shortly after I arrived in the United States when she wrote a letter some time in January, February or March, 1942. I, of course, told her to advise my wife that I had arrived safely in the United States and along with names of other friends in Germany, I told her to send my greetings to Pastor Kaiser.

At the conclusion of the Government's case, petitioner moved to dismiss both counts, or, in the alternative, for a directed verdict of acquittal on each, on the ground that the charges made in them had not been proved; both motions were denied (R. 22, 23–24). Petitioner did not testify, and offered no evidence in his behalf.

ARGUMENT

1. Petitioner contends that the trial court erred in granting the Government's motion "to strike from each of the two counts of the indictment" the words "in furtherance of a joint or common scheme or enterprise" (see footnote 1, *supra*) (Pet. 11). The granting of the motion was erroneous for two reasons, he contends. First, it "changed completely the charge as laid by the Grand Jury and, as a result thereof, vitiated the indictment" under the rule of *Ex parte Bain*, 121 U. S. 1 (Pet. 12, 5). Secondly, it operated to deprive petitioner of the opportunity to plead double jeopardy (Pet. 11–12, 4). In neither respect does petitioner's contention have merit.

(a) In respect of the claim that the granting of the Government's motion was a fatally erroneous amendment of the indictment as returned by the grand jury, under the rule of *Ex parte Bain*, it should be pointed out that the eliminated words, as the circuit court of appeals observed, were, "without question, surplusage" (R. 81). They constituted merely a descriptive, albeit superfluous, characterization of each offense charged. Their presence in the counts plainly did not render the counts demurrable, and there is no suggestion that the purpose in eliminating them was to avoid an adverse ruling on demurrer. In fact, petitioner had already pleaded not guilty to the indictment (see R. 1). Consequently, *Ex*

parte Bain, in which the stricken language was such that its presence in the indictment had made it demurrable (and, in fact, a demurrer had actually been sustained prior to the striking), has no application. As this Court said in *Salinger* v. *United States*, 272 U. S. 542, at 549:

> In the case of *Ex parte Bain*, 121 U. S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied.[5]

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[5] In *Edgerton* v. *United States*, 143 F. 2d 697 (C. C. A. 9), also relied on by petitioner (Pet. 5, 12), the court said (p. 699):

"We do not interpret Mr. Justice Van Devanter's remark [in the *Salinger* case] that the principle on which *Ex parte Bain* rests is no broader than the situation to which it was applied, as meaning to confine its application only to those cases where but for the amendment the indictment would fail to state a cause of action. * * * Instead, it would appear to be a reaffirmation of the principle that a count cannot be stricken in part as distinguished from a dismissal of the whole count."

We cannot agree, however, with the foregoing interpretation of the language of this Court in the *Salinger* case. We think that the language is clear and means precisely what the court in the *Edgerton* case said it did not mean, namely, that the rule of *Ex parte Bain* is limited to situations where the alteration or amendment works to cure an otherwise demurrable indictment. See Circuit Judge Hutcheson's concurring opinion in *Ralston* v. *Cox*, 123 F. 2d 196, 198 (C. C. A. 5), certiorari denied, 315 U. S. 796; see also *Johnson* v.

Furthermore, ***Ex parte Bain*** is distinguishable in another important respect. There the defendant did not consent to the trial court's striking of the words in question from the indictment, whereas here the record affirmatively discloses that petitioner's counsel did not oppose the granting of the Government's motion (R. 43) and consequently must be presumed to have acquiesced in it. The rationale of ***Ex parte Bain*** was that it would be an infringement of a defendant's right under the Fifth Amendment not to "be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury" if it were held that an indictment could be "amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being re-submitted to them for their approval" (121 U. S., at 5). But it is now settled that even the most fundamental constitutional rights can be waived (see, for example, *Adams* v. *United States ex rel. McCann,* 317 U. S. 269; *Johnson* v. *Zerbst,* 304 U. S. 458, 464–465; *Patton* v. *United States,* 281 U. S. 276; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113; *Diaz* v. *United States,* 223 U. S. 442, 449–453; *Trono* v. *United States,* 199 U. S. 521, 533). In fact, express provision is

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United States, 124 F. 2d 101, 103 (C. C. A. 5); *Bowles* v. *Laws*, 45 F. 2d 669, 672 (App. D. C.), certiorari denied, 283 U. S. 841; *United States* v. *Dembowski*, 252 Fed. 894, 898–899 (E. D. Mich.).

now made in the Federal Rules of Criminal Procedure (Rule 7 (b)), promulgated by this Court, for waiving the right to be prosecuted by indictment for infamous crimes, which was the very right basically involved in *Ex parte Bain*.[6] Since that basic right can be waived, surely the lesser and included "right" not to have obvious surplusage eliminated from the indictment as returned can also be waived. Cf. *Ralston* v. *Cox*, 123 F. 2d 196, 197–198 (C. C. A. 5), certiorari denied, 315 U. S. 796; *Bowles* v. *Laws*, 45 F. 2d 669, 671–672 (App. D. C.), certiorari denied, 283 U. S. 841.[7] Here, neither petitioner nor his "wise

[6] See also *United States* v. *Gill*, 55 F. 2d 399 (D. N. M., 1931), where Circuit Judge Phillips, after exhaustively reviewing the authorities, concluded that the constitutional provision that no one should be held to answer for an infamous crime except by indictment conferred a personal right which could be waived.

[7] See, however, *Stewart* v. *United States*, 12 F. 2d 524 (C. C. A. 9), and *Dodge* v. *United States*, 259 Fed. 300, 305 (C. C. A. 2), certiorari denied, 250 U. S. 660, holding that the defendant's consent to the striking of surplusage from an indictment was immaterial; see also *United States* v. *Norris*, 281 U. S. 619, 622–623, where this Court adverted, *obiter*, to the citation in *Ex parte Bain* of two state cases holding that the defendant's consent does not affect the rule that the wording of an indictment cannot be amended. In view of the now undoubted power of a defendant to waive prosecution by indictment entirely, we think that the *Stewart* and *Dodge* cases are clearly erroneous to the extent they held that the defendant's consent was immaterial. The question involved in the *Norris* case, *viz.*, whether a lengthy stipulation of facts could be considered as *added to* the indictment, was obviously quite different from that involved here, so that this Court's passing

and able counsel" (see R. 81) registered any protest against the elimination of the phraseology in question, and consequently, even assuming that he had the right to have the phraseology retained (see, however, *Salinger* v. *United States, supra,* to the contrary), he must be deemed to have waived it.

Finally, while the phraseology in this case was bracketed in the indictment and the jury instructed, in effect, to ignore it, it was not physically stricken, as in *Ex parte Bain.* This distinction has been considered pertinent by this Court as well as lower courts. Cf. *Ford* v. *United States,* 273 U. S. 593, 602; *Goto v. Lane,* 265 U. S. 393, 402–403; *Johnson* v. *United States,* 124 F. F. 2d 101, 103 (C. C. A. 5); *Ralston* v. *Cox,* 123 F. 2d 196, 197–198 (C. C. A. 5), certiorari denied, 315 U. S. 796; *Stewart* v. *District Court,* 16 F. 2d 863 (C. C. A. 9), certiorari denied, 273 U. S.

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reference to the two state cases, cited in *Ex parte Bain,* holding that the defendant's consent to amendment of the indictment was immaterial, can scarcely be considered indicative of a disposition on the part of this Court to hold, should the question ever be squarely presented to it, that a defendant's consent to the *striking* of *surplusage* from an indictment would be immaterial. In any event, however, since the elimination of the words in question in this case did not have the effect of curing an otherwise demurrable indictment and was not done for such a purpose, their elimination was proper under the rule of *Salinger* v. *United States, supra,* so that the effect of petitioner's consent to their elimination need not here be reached. It is merely mentioned as an additional basis of distinction between this case and *Ex parte Bain.*

755; *United States* v. *Munday*, 211 Fed. 536 (W. D. Wash.).

(b) Petitioner's claim that the granting of the Government's motion to eliminate the words "in furtherance of a joint or common scheme or enterprise" had the effect of depriving him of the opportunity to plead double jeopardy is elaborated as follows: By virtue of the presence of the quoted words in the indictment, he maintains, "it originally charged the defendant in one count with a conspiracy to violate the Communications Act of 1917 and in the other count with a conspiracy to violate the Censorship Act of 1941.[8] When the court granted the motion of the United States Attorney to strike out the words * * *, it completely changed the indictment and changed each count from a charge of conspiracy to a substantive offense"; but since petitioner had been previously (see R. 84–85) tried and convicted under "indictment #3000c, which charged the defendant with conspiracy to violate the Communications Act of 1917 and the Censorship Act of 1941,"[9] the "action of the trial court in striking

[8] Petitioner evidently has reference, respectively, to Section 3 (c) of the Trading with the Enemy Act of October 6, 1917 (*supra*, p. 3) and Section 303 of the First War Powers Act of December 18, 1941 (*supra*, p. 4), which are the statutes on which counts 1 and 2, respectively, were based.

[9] It is not entirely clear what statutes indictment No. 3000c charged petitioner with conspiring to violate. In the opinion of the circuit court of appeals, which is the only

the words above referred to from the indictment prevented the petitioner from entering a plea of *autre fois convict* or double jeopardy" (Pet. 11–12). This contention, while ingenious, is fallacious. Each count plainly charged a substantive offense. The incidental descriptive characterization of each offense as being "in furtherance of a joint or common scheme or enterprise" could not convert what was otherwise a charge of a substantive offense into a charge of the entirely different offense of conspiracy. Peti-

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place in the record where the content of indictment No. 3000c appears, it is stated that this indictment charged a conspiracy and "is exactly the same as Indictment No. 2886c," except that the period of the alleged conspiracy was different from that charged in No. 2886c (R. 80). Earlier in the opinion it is stated that indictment No. 2886c, "among other things, alleges that the defendant conspired to violate Title 50 U. S. C., Sections 102 and 105, and Title 50 U. S. C., App., Section 618, which are part of the censorship law and which is the basis for the offense of sending communications between the United States and a country at war with the United States by means of a code and other devices for the purpose of concealing the true and the intended meaning of such communications" (R. 79–80). 50 U. S. C. 102 and 105, referred to by the court, are apparently miscitations. It seems fairly clear, however, both from later language in the court's opinion (R. 80–81) and from petitioner's own statement that indictment No. 3000c charged him with conspiracy to violate the "Communications Act of 1917 and the Censorship Act of 1941" (Pet. 12), he having just previously thus referred to the Trading with the Enemy Act of 1917 and the First War Powers Act of 1941, respectively, that indictment No. 3000c charged conspiracy to violate the sections on which counts 1 and 2 of the indictment in this case were based.

tioner's conclusion, therefore, falls with his premise.[10]

2. Petitioner next contends that since his wife was an American citizen, she was not an enemy within the purview of Section 3 (c) of the Trading with the Enemy Act, and that therefore his conviction on count 1 cannot be sustained (Pet. 5–6, 14–15). Section 2 (a) of the Act (*supra*, p. 2), however, defines "enemy" as including, among others, "Any individual * * * *of any nationality,* resident within the territory * * * of any nation with which the United States is at war * * *" [italics supplied]. This plainly includes American citizens residing in enemy territory. In this respect, the Trading with the Enemy Act simply codified the common law rule that all residents of enemy territory are enemies regardless of nationality. *The Venus,* 8 Cranch 253; *The Frances,* 8 Cranch 335; *The Mary and Susan,* 1 Wheat. 46; *Mrs. Alexander's Cotton,* 2 Wall. 404; *Miller* v. *United States,* 11 Wall. 268; *Ford* v. *Surget,* 97 U. S. 594; *Juragua Iron Co.* v. *United States,* 212 U. S. 297; *Faber* v. *United States,* 81 C. Cls. 142, certiorari denied, 296 U. S. 596; cf. *Herrera* v. *United States,* 222 U. S. 558; see *Gregg's Estate,* 266 Pa. 189, 192–193, certiorari denied, 252 U. S. 588. Clearly,

[10] Furthermore, as the court below observed (R. 81), petitioner's counsel evidently did not believe at the time that the elimination of the phraseology in question would have the effect now suggested, since they made no objection.

nothing in Section 2 (c) of the Act (*supra*, pp. 2–3) was intended, as petitioner suggests (Pet. 14–15), to delimit Section 2 (a) by excluding therefrom American citizens residing in enemy territory. Section 2 (c) merely gave the President power to broaden the scope of the term "enemy" by including in it "Such *other* individuals * * * as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, *wherever resident* * * *" [italics supplied] as he in his discretion might deem necessary.

Petitioner further contends that there was no proof that his wife "was resident within a nation with which the United States was at war" (Pet. 15). Mrs. Frey, however, testified that Mrs. Krepper went to Germany and returned to the United States some time prior to 1941; that she returned to Germany in March of 1941; that, so far as she knew, she was still living there, in Budelsdorf; and that prior to the letter written to Mrs. Krepper *via* Barcelona she had been accustomed to writing directly to her in Germany, addressing the letters, "Budelsdorf, Rensburg, Germany." In addition, petitioner admitted to the F. B. I. agents that following his meeting with Kappe in Berlin he "returned home" and told Mrs. Krepper of his code arrangement with Kappe; that the code was to apply to letters going "both ways, coming from his wife in Ger-

many or to his wife in Germany"; and that in Barcelona, Reverend Kloess agreed to forward "on to his wife in Germany" all mail addressed to her. The jury was obviously justified in finding, therefore, that Mrs. Krepper was residing in Germany at the time the letter involved in this case was mailed to her by way of Barcelona. And while there is some conflict in the evidence as to the exact time this letter was mailed—Mrs. Frey having testified the time to have been December 19, 1941, and petitioner having stated in his written admission that the letter was written in January, February, or March of 1942—in either event the letter was mailed while Germany and the United States were at war.

3. Petitioner also contends that, in respect of count 1, there was no proof of the *corpus delicti* other than his own admission, and that therefore, under the familiar rule that a confession or admission of guilt, to sustain a conviction, must be corroborated by some independent evidence of the *corpus delicti,* his conviction on that count cannot be sustained (Pet. 5, 12–13). This contention, however, is based on the misconception that it was incumbent on the Government to identify Walter Kappe, establish his enemy status, and prove that petitioner sent him a message (see Pet. 13). All that the Government had to prove under this count was that petitioner sent, or caused to be sent, out of the United States, a communication intended for an enemy of the

United States. Mrs. Krepper, to whom the letter involved herein was addressed, was, as we have shown, an enemy of the United States within the meaning of the statute. Mrs. Frey's testimony provided complete corroboration of the *corpus delicti* of this count. The fact that "Pastor Kaiser," to whom petitioner directed Mrs. Frey to send his greetings, was a code name for Walter Kappe had no relevance whatever in respect of count 1.

4. Petitioner finally contends that his conviction on count 2 cannot be sustained for the following reasons: Executive Order 8985,[11] implement-

[11] This executive order was dated December 19, 1941, and filed December 20, 1941, at 11:45 a. m. It provided in pertinent part (6 F. R. 6625):

"By virtue of the authority vested in me by the Constitution and the statutes of the United States, and particularly by section 303, Title III of the act of December 18, 1941, Public Law 354, 77th Congress, 1st Session, and deeming that the public safety demands it, I hereby order as follows:

"1. There is hereby established the Office of Censorship, at the head of which shall be a Director of Censorship. The Director of Censorship shall cause to be censored, in his absolute discretion, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country * * * in accordance with such rules and regulations as the President shall from time to time prescribe. The establishment of rules and regulations in addition to the provisions of this order shall not be a condition to the exercise of the powers herein granted or the censorship by this order directed. The scope of this order shall include all foreign countries except such as may hereafter be expressly excluded by regulation.

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"FRANKLIN D ROOSEVELT."

ing Section 303 of the First War Powers Act (*supra*, p. 4), on which the count was based, "was not filed with the Federal Register until December 20, 1941"; the Federal Register Act provides that such an executive order "shall not be effective until the order is filed with the Federal Register";[12] Mrs. Frey specifically testified that the letter involved in this case was written December 19, 1941; in view of this definite testimony, it must be considered as established that the date of this letter was December 19, 1941, notwithstanding petitioner's assertion in his written admission that the letter was written in January, February, or March, 1942; therefore the alleged use of a code by petitioner, as charged in count 2,

[12] Section 7 of the Federal Register Act of July 26, 1935, c. 417, 49 Stat. 502, 44 U. S. C. 307, provides in pertinent part: "No document required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division [defined in section 1 as a division of the National Archives Establishment to be established by the Archivist of the United States] and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. .* * *." Section 5 (a) (44 U. S. C. 305 (a)) provides: "There shall be published in the Federal Register (1) all * * * Executive orders, except such as have no general applicability and legal effect * * *."

for the purpose of concealing from censorship, under rules established by the President, the intended meaning of his communication was not an offense at the time (Pet. 5, 13–14).

In respect of the same contention, advanced by petitioner in the circuit court of appeals, the court said (R. 70–71):

> There is no question but what the position of the defendant would be well maintained if the evidence was solely confined to the date December 19, 1941, but the testimony was not definite that the letter in question was written on December 19, 1941. The witness, Mrs. Hilda Frey, in one part of the testimony stated the letter was written within the first week of the defendant's arrival which, if the jury believed this statement, could fix the date of the writing of the letter to be December 23, 1941, at which time the [executive order] would be in effect. Furthermore, the defendant's written admission set forth that the letter was written during the month of January, February or March of 1942. * * *
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> * * * * *
>
> We are, therefore, of the opinion that under the testimony produced by the Government, sufficient evidence exists on which the jury could base their finding that the offense complained of in the Indictment occurred * * * at any time during the first week after December 16, 1941, the farthest removed date being December 23, 1941 in the month of December, or during

> the months of January, February or March, 1942.
>
> For the reason just mentioned, it is the belief of the Court that justification existed in refusing to dismiss Count II of the Indictment * * *.

While we agree with the circuit court of appeals that there was ample evidence from which the jury might have found that the letter in question was written later than December 20, 1941, the date on which Executive Order 8985 was filed and before which, consequently, petitioner was not chargeable with knowledge of the order, it must be admitted that the charge to the jury did not require them to find that the letter was sent after that date in order to find petitioner guilty under count 2. The pertinent portion of the charge is as follows (R. 27):

> Now, I call your attention to the fact that this executive order was issued on the 19th of December in 1941 and the evidence in this case would indicate that the letter was written not earlier than the 19th of December in 1941. Of course when actually it was written is for you to determine.

Clearly, under the charge the jury was left free to convict on count 2 even though they found that the letter in question was sent December 19, 1941, the date on which Mrs. Frey definitely testified it was written.[13] We concede that peti-

[13] By way of explanation of the trial judge's failure to require the jury to find that the letter was written after De-

tioner's sending of an uncensored, coded communication was not an offense under Section 303 of the First War Powers Act, on which count 2 was based, if the letter was written prior to December 20, 1941, when the executive order implementing the section became effective. Due, therefore, to the deficiency of the charge to the jury in the respect mentioned, we agree with petitioner that his conviction on count 2 cannot be sustained. Since, however, petitioner's ten-year sentence on that count was made to run concurrently with his sentence of equal length on count 1, his conviction on which, for the reasons we have given, we think unassailable, there is no necessity for remanding the case for further proceedings below. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.[14]

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cember 20, 1941, as a condition of their finding petitioner guilty on count 2, it should be stated that, so far as the record reflects, the distinction between December 19, 1941, when the executive order was issued, and December 20, 1941, when it was filed and became effective, was not in issue at the trial. Petitioner, so far as the record reflects, did not call the trial judge's attention to the fact that the executive order was not filed until December 20, 1941, did not request an instruction that the jury be required to find that the letter was written after December 20, 1941, in order to find him guilty on count 2, and did not assign the judge's failure to do so as error.

[14] Petitioner's additional contention that count 1 was invalid for failure to negative exceptions contained in the statute on which it was based (Pet. 6, 15–16) is founded on a

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring review by this Court. We therefore respectfully submit that it should be denied.

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misconception of the part of the statute on which the count was based. Petitioner quotes (Pet. 15), and seems to think the count was based on, that part of Section 3 (c) of the Trading with the Enemy Act which made it unlawful for any person (other than persons in the service of the United States Government and other non-enemy Governments, and other persons specially excepted by the President) "to send, or take out of, or bring into * * * the United States, and letter or other writing * * *, except in the regular course of the mail; * * *." That portion of Section 3 (c), however, was not involved in this case. Count 1 was obviously based on the second clause of Section 3 (c), following the semicolon, and providing: "and it shall be unlawful for any person to send * * * out of the United States, any letter * * * intended for * * * an enemy * * *" (*supra*, p. 3). The exceptions which petitioner contends the count failed to negative clearly had no application to this portion of the statute. The count, it may be observed, did negative the obtaining of the license or consent of the President to send the letter in question (R. 3), the obtaining of which, under the proviso contained in the statute, would have rendered the sending lawful.

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